

From South Fork -Fact Sheet -- the regs that specify EPA Obligations under Other Acts

A. Endangered Species Act, Magnuson-Stevens Fishery Conservation and Management Act, and National Historic Preservation Act

Under Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), the EPA must ensure that any action authorized, funded, or carried out by the EPA is not likely to jeopardize the continued existence of any federally listed endangered species or threatened species or result in the destruction or adverse modification of such species' designated critical habitat. If the EPA's action (i.e., OCS air permit issuance) may affect a federally listed species or designated critical habitat, Section 7(a)(2) of the ESA and relevant implementing regulations at 50 C.F.R. part 402 require consultation between the EPA and the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), depending on the species and/or habitat at issue.

In accordance with Section 305(b)(2) of the MSFCMA, 16 U.S.C. § 1855(b)(2), Federal agencies are also required to consult with the NMFS on any action that may result in adverse effects to essential fish habitat (EFH).

Section 106 of the NHPA, 16 U.S.C. 470f, and the implementing regulations at 36 C.F.R. part 800 require federal agencies to consider the effect of their actions on historic properties and afford the opportunity for the Advisory Council on Historic Preservation (ACHP) and consulting parties to consult on the federal undertaking.

The ESA regulations at 50 C.F.R. § 402.07, the MSFCMA regulations at 50 C.F.R. § 600.920(b), and the NHPA regulations at 36 C.F.R. § 800.2(a)(2) provide that where more than one federal agency is involved in an action, the consultation requirements may be fulfilled by a designated lead agency on behalf of itself and the other involved agencies. As previously discussed, the BOEM is the designated lead agency for the purposes of fulfilling EPA's obligations under Section 7 of the ESA, Section 305(b) [of the] MSFCMA, and Section 106 of the NHPA for offshore wind development projects on the Atlantic OCS, including the project. As a result of this designation, BOEM will consider the effects of the EPA's OCS permitting action in fulfilling its consultation obligations under each of these statutes for the NEPA ROD and COP approval process.

At the time of writing this Fact Sheet and the EPA's associated proposal of the draft permit, the BOEM has commenced but not completed its consultation requirements for ESA, MSFCMA, and NHPA for the COP approval and NEPA ROD for the project. The EPA understands that the BOEM will satisfy its statutory obligations as lead federal agency under each of these statutes prior to EPA issuance of a final OCS air permit for the South Fork windfarm. Should the result of BOEM's consultation under one or more of these statutes identify any conditions or restrictions on air emissions for inclusion in the OCS air permit, the EPA will include those conditions or restrictions in the final permit as necessary. The EPA will provide an additional opportunity for public comment regarding any such new conditions or restrictions as necessary and appropriate.

B. Coastal Zone Management Act

Section 307 of the CZMA, 16 U.S.C. § 1456, and the implementing regulations at 15 C.F.R. part 930 provide a federal consistency process for state programs to use to manage coastal activities and resources and to facilitate cooperation and coordination with federal agencies. Generally, federal consistency requires that federal actions, within and outside the coastal zone, which have reasonably foreseeable effects on any coastal use (land or water) or natural resource of the coastal zone be consistent with the enforceable policies of a state's federally approved coastal management program. Federal actions include federal agency activities, federal license or permit activities, and federal financial assistance activities. Federal agency activities must be consistent to the maximum extent practicable with the enforceable policies of a state coastal management program, and license and permit and financial assistance activities must be fully consistent.

Under 15 C.F.R. part 930, subpart D, a non-federal applicant for a federal license or permit is required to provide a state with a consistency certification if the state has identified the federal license or permit on a list of activities subject to federal consistency review in its federally approved coastal management program. State federal consistency lists identify the federal agency, federal license or permit, and federal financial assistance activities that are subject to federal consistency review if the activities occur within a state's coastal zone pursuant to the applicable subparts of the regulations at 15 C.F.R. part 930. The EPA has reviewed the listed federal actions for federal license or permit activities for Massachusetts and Rhode Island. The EPA's action to issue an OCS air permit under the regulations at 40 C.F.R. part 55 is not included on the current list of federal actions for federal consistency review. Thus, issuance of this OCS air permit is not required to be preceded by a federal consistency review.⁵⁸

⁵⁸ The EPA confirmed with the State of Rhode Island and the Commonwealth of Massachusetts that the states do not seek a consistency review for OCS air permits. A copy of the email confirmation from Rhode Island and Massachusetts is included in the administrative record for this action.